in the "price squeeze" behavior that concerned the Commission in the *USTelecom Forbearance Order*.[143]

Finally, the Commission has a plethora of rules concerning RLEC accounting for regulated and deregulated activities – such as the allocation rules in Part 64, Subpart I[144] – and NECA and the Commission regularly audit RLECs. As noted in the *USTelecom Forbearance Order*, ILECs remain subject to rate regulation, Section 251 obligations, and the continuing general obligation to provide service at just, reasonable, and not unreasonably discriminatory rates, terms and conditions under Sections 201 and 202 of the Act.[145] These rules effectively address potential cost-shifting involving other, potentially more significant, unregulated operations of RLECs, such as the offering of video services. No one has suggested that those RLEC unregulated services should be subjected to structural separation.

2. Unconditional Forbearance From Application of Rule 64.1903 to RLECs Meets the Section 10 Criteria

Rather than continuing to maintain an oppressive requirement in order to remedy a theoretical and, at the very least, outdated problem, the Commission should expeditiously eliminate structural separation for rate-of-return companies unconditionally. Given RLECs' lack of incentives and ability to raise common line and special access rates through cost misallocation and the effectiveness of the Commission's continuing rules, forbearance from enforcement of Rule 64.1903 would easily meet the Section 10 criteria. In light of these marketplace and

143 *USTelecom Forbearance Order*, 28 FCC Rcd at 7694 ¶ 151.

144 *See* 47 C.F.R. § 64.901 *et seq*.

145 *USTelecom Forbearance Order*, 28 FCC Rcd at 7691 ¶ 142.

regulatory safeguards, the Rule 64.1903 structural separation requirements are not necessary to ensure that RLEC access or long distance charges or practices are just and reasonable and not unjustly or unreasonably discriminatory or to protect consumers.[146] Moreover, because forbearance would free RLECs from restrictions that hobble them in competing with other carriers and competitive service providers, as discussed above, forbearance would promote competitive conditions and thereby further the public interest.[147]

Furthermore, such forbearance should not be conditioned on the special access performance metrics and imputation requirements imposed on price cap ILECs as a condition of relief from Rule 64.1903 in the *USTelecom Forbearance Order*.[148] As explained above with regard to the same requirements imposed on the RBOCs as a condition of relief in the *Section 272 Sunset Order*, those additional requirements impose costs on carriers without meaningful countervailing benefits to consumers or competition. Like the Section 272 separate affiliate and Section 272(e) provisions and the Rule 64.1903 structural separation rules, those additional obligations are based on arcane notions about separate local and long distance services and providers. They are no longer relevant, given the prevalence of bundled, all-distance services. ILECs are providing local access largely to themselves.[149]

---

[146] 47 U.S.C. § 160(a)(1), (2).

[147] *Id.* § 160(a)(3), (b).

[148] *USTelecom Forbearance Order*, 28 FCC Rcd at 7691-93 ¶¶ 142-48 (citing *Section 272 Sunset Order*, 22 FCC Rcd at 16488-90 ¶¶ 97-100).

[149] *See* discussions of the tiny share of all voice connections that are ILEC lines presubscribed to stand-alone long distance providers in Parts III.A and C, *supra*.

As explained with regard to the same conditions imposed on the RBOCs, there is little opportunity in this bundled marketplace to provide access to other long distance providers on a delayed or otherwise discriminatory basis or to charge other long distance providers more than ILECs impute to themselves. Because the Rule 64.1903 structural separation rules and related conditions "only address[] . . . stand-alone long distance service, which has become a fringe market" they are "unlikely to ensure" just, reasonable and nondiscriminatory rates and practices or to protect consumers.[150] Moreover, because those requirements provide little or no benefit and add unnecessary costs, forbearance also would further the public interest.[151] Unconditional forbearance from the obsolete structural separation rules therefore would meet all of the Section 10 criteria. Accordingly, for all of the same reasons that the Commission should forbear from continuing to apply the special access performance metrics and imputation conditions to the RBOCs, the forbearance relief sought here for RLECs should be granted without any conditions.

C. The Commission Should At a Minimum Forbear From Enforcing Rule 64.1903 Against RLECs Participating in NECA Pools, Especially in the Case of Average Schedule Companies

At a minimum, the Commission should eliminate the structural separation requirements – and not impose any special access performance metrics or imputation conditions – on RLECs that participate in the NECA pooling process, especially those that utilize average schedules. As the Commission has observed, these carriers' ability to misallocate their costs is limited.[152] In the *USTelecom Forbearance Order*, the Commission conceded that "average schedule companies

[150] *USTelecom Forbearance Order*, 28 FCC Rcd at 7637 ¶ 16.

[151] *Id.* at 7637-38 ¶ 17. *See* 47 U.S.C. § 160(a)(3).

[152] *USTelecom Forbearance Order*, 28 FCC Rcd at 7694-95 ¶¶ 152-53 & n.425.

appear to have limited incentives to misallocate costs as long as they continue to use the average schedules for access compensation," but denied relief as to these companies because they can convert to cost-based regulation without Commission approval.[153] That theoretical possibility, however, could easily be avoided by requiring that any average schedule company with a facilities-based long distance operation that wishes to convert to cost-based regulation seek Commission approval. Conditions could be imposed on any such approval to negate the possible cost misallocation that might arise.

With such conditions imposed on average schedule companies seeking to convert to cost-based regulation, forbearance from enforcement of Rule 64.1903 for RLECs participating in NECA pools, particularly in the case of average schedule companies, would easily meet the Section 10 criteria. Given the minimal or nonexistent incentive and ability of such carriers to misallocate costs, the Rule 64.1903 structural separation requirements are not necessary to ensure that RLEC access or long distance charges or practices are just and reasonable and not unjustly or unreasonable discriminatory or to protect consumers.[154] Moreover, because forbearance would free RLECs from restrictions that hobble them in competing with other carriers and competitive service providers, as discussed above, forbearance would promote competitive conditions and thereby further the public interest.[155]

---

[153] *Id.* at 7694 ¶ 153 n.425.

[154] 47 U.S.C. § 160(a)(1), (2).

[155] *Id.* § 160(a)(3), (b).

D. Forbearance From Rule 64.1903 Should be Unconditional for all ILECs

Price cap ILECs also should be relieved of the special access performance metrics and imputation requirements imposed on them as a condition of forbearance relief from Rule 64.1903 in the *USTelecom Forbearance Order*. All of the reasons set forth above for eliminating those additional requirements for the RBOCs in the context of Section 272 and for granting the RLECs unconditional forbearance relief from Rule 64.1903 apply equally, if not even more strongly, to the price cap ILECs.[156] Costs, imputed or otherwise, are much less relevant to price cap ILECs than they are to RLECs. Because of the irrelevance of costs, combined with the irrelevance of requirements based on the assumption of separate local and long distance services and markets, elimination of these additional requirements for price cap ILECs would easily meet the first two prongs of the Section 10 standard.[157] Moreover, because they provide little or no benefit and add unnecessary costs, elimination also would further the public interest.[158] Accordingly, for all of the same reasons that the Commission should forbear from continuing to apply the special access performance metrics and imputation conditions to the RBOCs, and that forbearance relief from Rule 64.1903 for the RLECs should be unconditional, the Commission similarly should forbear from continuing to apply those conditions to price cap ILECs.

---

[156] *See USTelecom Forbearance Order*, 28 FCC Rcd at 7691-93 ¶¶ 142-48 (citing *Section 272 Sunset Order*, 22 FCC Rcd at 16488-89 ¶¶ 97-98).

[157] Because the structural separation rules and related conditions, like the equal access requirement forborne in the *USTelecom Forbearance Order*, "only address[] . . . stand-alone long distance service, which has become a fringe market," 28 FCC Rcd at 7637 ¶ 16, they are "unlikely to ensure" just, reasonable and nondiscriminatory rates and practices or to protect consumers. *Id.*

[158] *See id.* at 7637-38 ¶ 17. *See* 47 U.S.C. § 160(a)(3).

IV. THE COMMISSION SHOULD FORBEAR FROM APPLICATION OF THE REQUIREMENT TO PROVIDE AN UNBUNDLED 64 KBPS VOICE CHANNEL IN CASES WHERE THE ILEC HAS REPLACED A COPPER LOOP WITH FIBER AND RETIRED THE COPPER LOOP

In the *Triennial Review Order*,[159] the Commission correctly concluded that requiring ILECs to provide unbundled access to newly deployed fiber-to-the-home loops would deter fiber investment, and thus declined to mandate such unbundling. The Commission held, however, that "in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops," the ILEC has a limited requirement to provide competing carriers access to a 64 kbps voice-grade channel over the fiber so that such providers can compete for narrowband services.[160]

Regardless of whether this 64 kbps requirement made sense in 2003, its continued existence results in unnecessary burdens for one set of providers and undermines the broader shift to next-generation fiber facilities while providing no meaningful offsetting benefits to consumers. In order to eliminate barriers to infrastructure investment and competition, the Commission should now forbear from applying the requirement that ILECs incur wasteful costs by developing solutions involving equipment and/or information technology to provide a 64 kbps channel over fiber that would rarely be used given consumers' shift away from traditional narrowband voice services. This requirement impedes the transition to more reliable and robust fiber networks, and the consumer benefits that flow from fiber.

---

[159] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part on other grounds sub nom. USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[160] *Id.* at 17142 ¶ 273, 17145 ¶ 277.

By contrast, any consumer benefits of this requirement are minimal at best. The marketplace facts since 2003 have shown that consumers have shifted in huge numbers away from traditional narrowband services towards voice services provided by wireless, cable, and over-the-top ("OTT") VoIP providers. Facilities-based competition among wireline, wireless, and cable providers in the voice marketplace is robust, thereby producing competitive rates. Moreover, given the rapidly evaporating demand for standalone narrowband voice, consumers do not – and will not – benefit from saddling one set of providers with the obligation to provide a narrowband channel to competitors over their next-generation broadband networks. Moreover, the marketplace now provides other options – including wholesale alternatives, resale, or over-the-top – for non-facilities-based providers to compete in the provision of voice services.

A. The 64 Kbps Requirement Is Not Necessary to Ensure Just, Reasonable, and Nondiscriminatory Rates For Narrowband Services

Given the many choices available to consumers for access to competitive voice services, the 64 kbps requirement is not necessary to ensure that ILECs' rates for narrowband services are just, reasonable, and nondiscriminatory. As the Commission long has recognized, robust competition such as that typifying all segments of today's communications industry "is the most effective means of ensuring that the charges, practices, classifications, and regulations with respect to [a telecommunications service] are just and reasonable, and not unjustly or unreasonably discriminatory."[161] In today's marketplace, competition from wireless carriers,

[161] *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270 ¶ 31 (1999); *see also Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report & Order, 9 FCC Rcd 1411, 1478 ¶ 174 (1994) ("[c]ompetition, along with the impending advent of additional competitors, leads to reasonable rates"); *see also id.* at 1478 ¶ 173 ("in a competitive market, market forces are generally

cable companies, and OTT VoIP providers constrains the rates that ILECs can charge for narrowband voice services, and these facilities-based and OTT providers have attracted consumers in huge numbers over the last decade. In light of this competition, requiring ILECs that have retired a copper loop, to "provide unbundled access to a 64 kbps transmission path over its FTTH loop" undermines competition and harms consumers. Indeed, in some cases, this rule might foreclose ILECs from retiring the copper loop at all, forcing them to maintain redundant networks and diverting resources away from next-generation deployments.

From a competitive standpoint, the marketplace for voice services is vastly different today from when the 64 kbps requirement was adopted in 2003. The *Triennial Review Order* described the 64 kbps requirement as "a very limited requirement intended only to ensure continued access to a local loop suitable for providing narrowband services to the mass market in situations where an [ILEC] has deployed overbuild FTTH and elected to retire the pre-existing copper loops."[162] Discussing intermodal competition, the Order stated that although "[n]either wireless nor cable ha[d] blossomed into a full substitute for wireline telephony" at that time, the Commission "expect[ed] intermodal platforms to become increasingly a substitute for wireline voice telephony services and for wireline broadband services" and that "[t]he presence of such

---

sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service"); *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd 3873, 3878 ¶ 9 (1995) ("where we can reduce our regulations because of effective competition, carriers are better able to respond to consumer demand for innovative services at the lowest reasonable price").

[162] *Triennial Review Order*, 18 FCC Rcd at 17145 ¶ 277.

alternatives in the future may enable us to find that requesting carriers are no longer impaired in their ability to compete without access to [ILEC] loops."[163]

As discussed above, the intermodal competition predicted by the Commission – and the consumer choice fueled by those competitive choices – have arrived. As of June 2013, ILECs served a total of about 78.5 million switched and VoIP access lines – down almost 100 million from the 178 million they served in June 2000.[164] By contrast, the number of wireless telephone subscriptions exploded to 305,742,000 as of mid-2013, a 237 percent increase over the 90,644,000 mobile wireless telephone subscribers in June 2000.[165] The number of wireless-only households has increased even more dramatically. When the *Triennial Review Order* issued, "3 to 5 percent of wireless customers use[d] their wireless phone as their only phone."[166] According to the Centers for Disease Control ("CDC"), as of late 2013, 41 percent of American households were "wireless only."[167] An additional 16.1 percent of households have both wireline and wireless phones but receive all or almost all calls on their wireless phones.[168] In short, as

[163] *Id.* at 17127-28 ¶¶ 245-46.

[164] *Compare 2009 Local Telephone Competition Report* at 13, Table 1, *with Mid-2013 Local Telephone Competition Report* at 12, Table 1.

[165] *Compare* Industry Analysis Div., FCC, *Local Telephone Competition: Status as of December 31, 2000* at Table 9 (May 2001), *available at* http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0501.pdf, *with Mid-2013 Local Telephone Competition Report* at 29, Table 18.

[166] *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, Seventh Report, 17 FCC Rcd 12985, 13017 (2002).

[167] *CDC Second Half 2013 Wireless Report* at 5, Table 1 (data for the last six months of 2013).

[168] *Id.* at 4; *see also* Mayo Decl. ¶ 16 ("[W]hile the first part of the last decade saw the percentage of households subscribing to both wireline and wireless services grow, this

Professor Mayo puts it, "[t]he past ten years have witnessed a complete dismantling of one-hundred years of loyalty by Americans to wireline voice telephone service."[169]

Voice competition from cable has also increased dramatically. According to NCTA's website, there are now 28 million cable telephony subscribers, which is more than a tenfold increase over the figure cited in the *Triennial Review Order*.[170] The third largest provider of residential voice services in the country is Comcast.[171] Consumers can also obtain voice services from OTT VoIP providers like Vonage over any broadband connection. According to the most recent Commission data, there are now 45 million interconnected VoIP subscriptions.[172]

The dramatic increases in wireless, cable, and VoIP subscriptions and the dramatic decrease in the number of retail switched access lines over traditional ILEC facilities show that competition constrains the rates that ILECs can charge for their narrowband voice services. The 64 kbps requirement is unnecessary to constrain the rates that ILECs charge for such services.

---

percentage peaked in 2007 and has declined precipitously since then. . . . This falling percentage of households subscribing to both wireline and wireless and the growing number of households that are 'wireless only' suggests that households have grown to see mobile telephone subscriptions as sufficient to satisfy all their telecommunications needs.").

[169] Mayo Decl. ¶ 6.

[170] *See* NCTA, Industry Data, Cable's Customers Base, https://www.ncta.com/industry-data (last visited Oct. 6, 2014); *Triennial Review Order*, 18 FCC Rcd at 17016 ¶ 52.

[171] News Release, Comcast, *Comcast Now the Third Largest Residential Phone Services Provider in the U.S.* (Mar. 11, 2009), *available at* http://corporate.comcast.com/news-information/news-feed/comcast-now-the-third-largest-residential-phone-services-provider-in-the-us.

[172] *See Mid-2013 Local Telephone Competition Report* at 2, Figure 1.

B. The 64 Kbps Requirement is Not Necessary to Protect Consumers

Just as the Commission's 64 kbps requirement is not necessary to ensure that rates are just, reasonable, and nondiscriminatory, the requirement is unnecessary to protect consumers. As Chairman Wheeler recently observed, "[c]ompetition promotes efficient pricing, technical progressiveness, consumer protection, and . . . private investment."[173] Here, the competition described above from wireless, cable, and OTT VoIP protects consumers of voice services.

Moreover, there is no evidence that providers still seek to provide "narrowband services to the mass market"[174] over ILECs' legacy facilities as a meaningful and ongoing business model, especially for residential customers. Indeed, voice competition has shifted dramatically away from intramodal services reliant on ILEC network elements and toward intermodal alternatives. From December 2008 to June 2013, the number of residential switched access lines served by non-ILECs (a term that encompasses CLECs) decreased by half, from approximately 5.6 million to 2.8 million.[175] The 2.7 million non-ILEC residential switched access lines accounted for less than 3.6 percent of total lines serving residential customers.[176] By contrast, non-ILECs served 29.2 million residential lines (or more than 90 percent of all residential lines served by non-

---

[173] Tom Wheeler, Chairman, FCC, Remarks at National Cable & Telecommunications Association, at 5 (Apr. 30, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-326852A1.pdf.

[174] *Triennial Review Order*, 18 FCC Rcd at 17145 ¶ 277.

[175] *Compare* Industry Analysis and Technology Div., FCC, *Local Telephone Competition: Status as of December 31, 2008*, at 5, Figure 3 (June 2010), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-299052A1.pdf, *with Mid-2013 Local Telephone Competition Report* at 5, Figure 4.

[176] *See Mid-2013 Local Telephone Competition Report* at 5, Figure 4, and 21, Table 10.

ILECs) using interconnected VoIP.[177] Although the vast majority of the 29.2 million interconnected VoIP residential lines are cable lines, the fact remains that, even aside from all of the other facilities-based options available to consumers, competitors can rely on interconnected VoIP and other alternative approaches that obviate any need for a 64 kbps voice-grade channel over fiber.

Furthermore, as explained in the Caves Declaration, technological progress in the industry has substantially diminished the significance of the 64 kbps requirement. For example, among the RBOCs, the number of consumers receiving narrowband voice services from CLECs using analog UNE loops, which are typically used for narrowband voice service, represented only about **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of the 135 million access lines in service as of 2013.[178] Further, among the RBOCs for which data are available, the number of analog UNE loops in service declined by approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** percent from 2003 – 2013, while the number of *new* analog UNE loops brought into service annually (*i.e.*, gross additions) declined by approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** percent.[179] In light of this rapidly dwindling demand for ILEC analog UNE loops, it makes no sense to require ILECs to provide a 64kbps narrowband voice-grade channel over fiber when they retire copper. Indeed, at least one prominent provider, TelePacific, has stated that a 64 kbps voice-grade channel "is inadequate to meet the bandwidth demanded by both business and residential

---

[177] *See id.*

[178] Caves Decl. at ¶ 89.

[179] *Id.*

customers."[180] Thus, the 64 kbps requirement provides no benefits to consumers.[181] Marketplace developments have ensured that customers have the benefit of robust intermodal competition even without widespread unbundling.

Given the above, the 64 kbps requirement harms, rather than helps, consumers, by undercutting ILECs' incentives to deploy and migrate customers to more reliable and advanced fiber facilities and thereby diverting resources away from the provision of next-generation services and toward the maintenance of costly network-sharing mechanisms that would rarely even be used. The Commission has already recognized that providing unbundled access to newly deployed fiber-to-the-home would deter fiber investment,[182] and maintaining redundant copper facilities solely for the purposes of providing access to competitive providers has a similar effect.

The 64 kbps requirement also deters fiber investment. ILECs that have deployed fiber-to-the-home must either maintain the copper network or have a solution in place to provide 64 kbps narrowband voice-grade channels over fiber. Under current technologies, providing a 64 kbps voice-grade channel over fiber generally requires installation of costly equipment at Central Offices and/or the development of complicated information technology solutions. These costs undermine the pro-consumer shift to heavier reliance on more reliable and advanced fiber

---

[180] Comments of TelePacific Communications at 12, GN Docket No. 12-353 (Jan. 28, 2013).

[181] Some providers may argue that the Commission should respond to the decline in demand for narrowband voice services by requiring ILECs to unbundle their fiber facilities. However, the Commission concluded that providing unbundled access to newly deployed fiber-to-the-home would deter fiber investment and should not be required as a matter of law and policy. *Triennial Review Order,* 18 FCC Rcd at 17110 ¶ 213, 17141-42 ¶ 272. The same reasoning applies even more so today.

[182] *Id.*

facilities to serve consumers. ILECs should not be required to incur these costs when competitors themselves recognize that there is unlikely to be any meaningful level of demand by consumers for narrowband voice services by providers using legacy ILEC facilities and when consumers have a plethora of choices using other, more-widely-embraced alternatives.

Finally, although the Commission's focus is on protecting consumers and competition rather than particular classes of competitors, eliminating the 64 kbps requirement also would not eliminate providers' ability to provide voice services to consumers without building their own network facilities. The statute requires an ILEC to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers,"[183] and this resale obligation applies to telecommunications services offered over fiber. Likewise, ILECs offer wholesale voice alternatives, such as Verizon's Wholesale Advantage product, for competitive providers. Competitive providers are also free to compete in the voice marketplace through over-the-top voice services that are supported by fiber and other broadband networks. Thus, eliminating the 64 kbps requirement would not deprive non-facilities-based competitors of multiple options for offering voice services to consumers, as other types of providers are doing today.

C. Forbearance From the 64 Kbps Requirement is in the Public Interest

Granting forbearance from the unbundled 64 kbps requirement is in the public interest. The public interest is served by eliminating unnecessary regulations that impose costs on the industry, and every government agency should strive to increase efficiencies by doing away with

[183] 47 U.S.C. § 251(c)(4)(A).

outdated regulatory requirements.[184] Here, the regulation imposes substantial costs that far outweigh any benefits. The 64 kbps requirement forces ILECs that have decided to retire cooper to incur wasteful costs to maintain outdated copper networks or to develop solutions to provide 64 kbps voice-grade channels over fiber. These costs deter investment in more reliable and more advanced fiber networks that support not only high quality voice services but also high quality broadband and other services.

It is in the public interest to remove regulatory obstacles to investment in fiber, especially where the regulatory benefits are minimal. Consumer demand for narrowband voice services continues to decrease dramatically as consumers shift to voice services provided by wireless, cable, and OTT VoIP providers. Thus, 64 kbps voice-grade channels over fiber would rarely ever be used. The public interest is served by eliminating the 64 kbps requirement. Doing so will allow ILECs to focus on developing fiber networks of the 21st century instead of maintaining outdated traditional narrowband services that are rapidly becoming obsolete.

V. THE COMMISSION SHOULD FORBEAR FROM ENFORCING SECTION 214(E)-BASED OBLIGATIONS WHERE A PRICE CAP CARRIER DOES NOT RECEIVE HIGH-COST UNIVERSAL SERVICE SUPPORT

Section 214(e)(1)(A) of the Act obligates carriers designated as "eligible" to receive universal service support – eligible telecommunications carriers ("ETCs") – to "offer the services that are supported by Federal universal service support mechanisms under section 254(c)"

[184] *See, e.g.*, *USTelecom Forbearance Order*, 28 FCC Rcd at 7656 ¶ 55 (Commission has an "obligation to remove costly, overly broad, and outmoded requirements and burdens in response to changes in markets and regulatory needs."). *See also Amendment of Section 64.702 of the Commission*'s *Rules and Regulations* (*Second Computer Inquiry*), 77 FCC 2d 384, 423 ¶ 102 (1980) (avoidance of unnecessary cost is in the public interest) ("*Computer II Final Decision*"), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (collectively referred to as "*Computer II*").

"throughout the service area for which the designation is received."[185] The Commission has interpreted Section 214(e)(1)(A) to require an ETC to provide the "supported" services throughout its service area regardless of whether such services are actually "supported" with high-cost funding throughout that area.[186] In order to eliminate barriers to infrastructure investment and competition, the Commission should forbear from applying its requirement that price cap ETCs provide "supported services" – defined as "'voice telephony service'" in the *Transformation Order*[187] – in those areas where they do not receive high-cost support.

Given the increasingly wide range of service options available, the wealth of competitive alternatives and consequent rapid decline in ILEC wireline market shares, and the fundamental revision of the high-cost universal service support regime brought about by the *Transformation Order*,[188] Section 214(e), as interpreted by the Commission, is not necessary to ensure reasonable and nondiscriminatory rates or to protect consumers. Indeed, the obligation has become counterproductive, and will become anticompetitive in some circumstances, once the

[185] 47 U.S.C. § 214(e)(1)(A).

[186] *See, e.g., Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8883-84 ¶ 192 (1997)("*First USF Order*") (noting that an ETC's "service area" is the "overall area for which the carrier *may* receive support," depending on costs of providing service) (emphasis added), *rev'd in part on other grounds sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999). *See also High-Cost Universal Service Support*, Order, 23 FCC Rcd 8834, 8847 ¶ 29 (2008) (carrier designated as ETC bears ETC obligations, regardless of whether it actually receives support), *aff'd Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009).

[187] *Transformation Order*, 26 FCC at 17692 ¶ 77.

[188] *Id.* at 17709-17872 ¶¶ 115-647.

Commission implements its Connect America Fund Phase II ("CAF II") mechanism.[189] At that point, a price cap ETC might lose high-cost funding to a competitor serving the same area or might be saddled with unique service obligations in an area where no funding is available to any carrier.[190] Under those circumstances, it makes no sense to have that price cap carrier continue to bear ETC obligations. Forbearance from enforcement of Section 214(e)(1)(A) where a carrier receives no high-cost support would meet all of the criteria of Section 10.

A. Imposing ETC Obligations on Entities Not Receiving High-Cost CAF Support is Not Necessary to Ensure Just and Reasonable Rates or Practices or to Protect Consumers.

Where consumers have at least one other voice telephony service provider in a given service area, there is no policy or legal justification for mandating that one particular type of carrier – the price cap carrier – continue providing voice service in that area as an ETC. Today, consumers nationwide enjoy a wide array of voice service choices, provided over an expanding range of technologies and platforms. Thus, even apart from other considerations, the dynamic competition that characterizes the communications industry ensures that Sections 10(a)(1) and 10(a)(2) are satisfied.

---

[189] *See id.* at 17725-38 ¶¶ 156-93.

[190] *See id.* at 17733 ¶ 180 (where price cap ILEC declines to make state-wide commitment for CAF Phase II support, its CAF Phase I support will be phased out), 17830 ¶ 509 (where unsubsidized providers have deployed service, no carrier – ILEC or CETC – will receive support), 18063 ¶ 1095 (ILECs and CETCs "may receive reduced support in their existing service areas, and ultimately may no longer receive any federal high-cost support").

Price cap carriers have seen their wireline subscriber base rapidly erode. ILEC switched legacy residential lines decreased by 73 percent from the end of 2000 to mid-2013,[191] and now serve barely one-quarter of U.S. households.[192] Even when ILEC VoIP lines are considered, total ILEC residential lines have fallen by two-thirds since 2000 and serve less than one third of all households.[193] ILEC total switched access and VoIP lines combined trail wireless penetration (89 percent) by a wide margin.[194] As discussed above, these trends have left ILECs with a small fraction of the total retail voice telephony service market. Only five percent of all households use ILEC legacy wireline services exclusively,[195] and ILEC lines account for less than 18 percent of all U.S. voice connections.[196]

---

[191] *Compare 2009 Local Telephone Competition Report* at 12, Table 1, *with Mid-2013 Local Telephone Competition Report* at 5, Figure 4; *see also* Caves Decl. ¶ 12 ("ILECs collectively lost approximately 95.4 million voice lines from 2000 – 2012.").

[192] *Research Brief* at 1; *Banks Letter* at 1.

[193] *Compare 2009 Local Telephone Competition Report* at 13, Table 2, *and Mid-2013 Local Telephone Competition Report* at 5, Figure 4; *see also* Caves Decl. ¶ 27; Research Brief at 3 (six percent of U.S. households projected to be served by ILEC VoIP services by the end of 2013; adding the ILEC VoIP six percent to the 26 percent served by ILEC switched landline voice service yields a total of slightly under one-third of all U.S. households served by ILEC lines).

[194] *See* Anna-Maria Kovacs, *The New Network Compact: Consumers Are in Charge*, at 11 (July 2014) (89 percent of U.S. households took wireless service by mid-2013), *available at* http://internetinnovation.org/images/uploads/IIA_A_New_Network_Compact_071714_Report.pdf ("Kovacs 2014 *New Network Compact* Paper").

[195] *Kovacs 2013 Telecommunications Competition Paper* at 11-12 (five percent of the population relies solely on legacy wireline services, and 95 percent of all consumers no longer rely solely on their ILEC for service); *see also* Mayo Decl. ¶ 16.

[196] This figure reflects the 78,537,000 ILEC access lines and VoIP connections listed in the *Mid-2013 Local Telephone Competition Report* at 12, Table 1, the 56,590,000 non-ILEC access lines listed in that report, and the 305,742,000 wireless accounts reported by FCC as of the mid-2013. *See also* Caves Declaration at ¶¶ 10, 12.

Accordingly, not only are there many voice telephony service choices for consumers in areas served by price cap carriers, but the data also show that consumers have moved away from stand-alone legacy services.[197] With consumers "increasingly shift[ing] from traditional telephone service" to alternatives, including VoIP and wireless,[198] no competitive or consumer protection purpose is served by mandating the ILECs, and no one else, to continue providing "supported services." The Section 214(e) service obligations thus have been rendered superfluous by the marketplace.

While these competitive facts alone would warrant forbearance from Section 214(e)(1)'s requirements in all service areas, USTelecom seeks such forbearance only where a price cap carrier receives no high-cost support. The *Transformation Order* replaced a regime in which multiple ETCs often received support in a given high-cost service area with one in which only a single carrier at most may receive CAF II support and, in some cases, a single mobile wireless carrier may receive Mobility Fund support.[199] There is no guarantee that a price cap ETC will

---

[197] *Kovacs 2014 New Network Compact Paper* at 11.

[198] *Transformation Order*, 26 FCC Rcd at 17669 ¶ 9. *See also Procedures for Assessment and Collection of Regulatory Fees*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 28 FCC Rcd 7790, 7795 ¶ 11 (2013) (wireless revenues have increased while switched access voice revenues have decreased, "in part due to substitution of wireless services for wireline services").

[199] *Transformation Order*, 26 FCC Rcd at 17727-32 ¶¶ 164-78, 17766-68 ¶¶ 280-84 (CAF support only for price cap carrier in each area or, under certain circumstances, for a single winner of competitive bidding in price cap areas), 17779-80 ¶¶ 316-20 (Mobility Fund support generally awarded to only one provider in any eligible area), 17825-30 ¶¶ 498-511 (identical support rule eliminated).

receive CAF II support in any given area.[200] Where a carrier no longer receives support, it likewise no longer should have the corresponding regulatory obligations. Stated differently, there is no justification for continuing to require a carrier to offer "supported" voice telephony services where it does not receive support. Under the Commission's new framework, this can occur in three different circumstances:

First, a price cap carrier will not receive support where costs in the relevant service area are not high enough to warrant high-cost support for any carrier. In these circumstances, service costs are low enough to elicit competitive entry. As the Commission explained in the *Transformation Order*, its goal is to ensure that all areas get service, "whether through the operation of the market or[,]" "where there is no private sector business case for deployment[,]" "through support from USF."[201] As discussed above, the plethora of communications options available nationwide "through the operation of the market" guarantees that consumer interests will be protected in these areas, and there is no need to perpetuate price cap carrier ETC designations and the corresponding ETC service mandate.

Second, a price cap carrier will not receive support where one or more unsubsidized carriers serve the same area.[202] Thus, in an area that does not qualify for high-cost support

---

[200] *Id.* at 17733 ¶ 180 (where price cap ILEC declines to make state-wide commitment for CAF Phase II support, its CAF Phase I support will be phased out), 17830 ¶ 509 (where unsubsidized providers have deployed service, no carrier – ILEC or CETC – will receive support), 18063 ¶ 1095 (ILECs and CETCs "may receive reduced support in their existing service areas, and ultimately may no longer receive any federal high-cost support").

[201] *Id.* at 17720 ¶ 145.

[202] *Id.* at 17830 ¶ 509. In this circumstance, the unsubsidized competitor must be providing "terrestrial fixed voice and broadband service." *Id.* at 17701 ¶ 103.

because of the presence of unsubsidized competitors, competition ensures that consumers will not be dependent upon a single provider's services, and there is no need for the price cap ETC designation and service mandate.

Third, a price cap carrier will not receive support where another ETC is receiving the support in that area instead. In such areas, the supported carrier can offer voice telephony services at reasonable rates, ensuring that consumers need not rely on the unsupported ETC's service, and there is no need for the price cap ETC designation and service mandate.[203]

Thus, there is no situation in which it is necessary for a price cap carrier not receiving support for a given area to be required to continue providing voice telephony service in that area. There should always be one or more other carriers to provide that service. The same is true for Lifeline service. For example, in every single AT&T price cap wire center, there are at least three Lifeline providers, and the average number of Lifeline providers across all AT&T wire centers is over 12.[204] Moreover, almost all Lifeline customers prefer wireless services.[205] Given the substantial non-reimbursable costs to carriers involved in Lifeline participation and the multiple Lifeline providers in price cap carriers' service areas, there is no reason to continue

---

[203] *Id.* at 17693-94 ¶¶ 80-81, 84-85 (as a condition of receiving support, ETCs must provide voice telephone service at rates comparable to urban rates for similar services). *See also* 47 U.S.C. § 214(e)(4) (States "shall permit" an ETC to relinquish its ETC designation in an area served by another ETC). The forbearance sought here would not extend to the supported ETC.

[204] Comments of AT&T at 32, WC Dkt. No. 10-90 (Aug. 8, 2014) ("AT&T CAF Comments").

[205] In two representative AT&T price cap carrier affiliate service areas, the percentage of total 2013 Lifeline disbursements going to wireless carriers was over 95 percent. *Id. See also* letter from Mary L. Henze, Ass't V.P., Federal Regulatory, AT&T, to Marlene Dortch, Secretary, FCC, WC Dkt. No. 10-90, at 3-4 (Sept. 15, 2014) ("Henze Letter").

compelling price cap carriers to offer Lifeline service to consumers that do not want it.[206] For these reasons, both ILECs and competitive ETCs have supported relieving ETCs of their service obligations and designations under Section 214(e)(1)(A) in areas where they do not receive support.[207]

Accordingly, forbearance from enforcement of the Section 214(e) ETC designation and service requirement in an area where an ETC does not receive high-cost support meets the Section 10(a)(1) and 10(a)(2) criteria, because such enforcement is not necessary to ensure just and reasonable rates and practices or to protect consumers.[208]

B. Forbearance From Enforcement of Section 214(e)(1)(A) Will Further the Public Interest

Forbearance also would further the public interest, satisfying the requirements of Section 10(a)(3).[209] Specifically, forbearance will advance national broadband deployment goals, promote competitive neutrality, help ensure the current regime's compliance with Section 254, and conform the ETC regime to the revised high-cost framework.

---

[206] Participating in the Lifeline program costs providers about $600 million annually, or about 37 percent of the yearly total cost of the program. AT&T CAF Comments at 32. Lifeline is a pass-through program, which means that carriers are reimbursed $9.25/month per customer for each $9.25 discount they provide to their Lifeline customers. *Id.* at 32-33. *See also* Henze Letter at 5.

[207] *See, e.g.*, Comments of AT&T at 3-17, WC Dkt. No. 10-90 (Jan. 18, 2012); Comments of T-Mobile USA, Inc. at 9, WC Dkt. No. 10-90 (Jan. 18, 2012).

[208] *See* 47 U.S.C. § 160(a)(1-2).

[209] *See id.* § 160(a)(3).

1. Forbearance Will Advance National Broadband Deployment Goals.

Section 706 of the Telecommunications Act of 1996 ("1996 Act") requires the Commission to "encourage the deployment . . . of advanced telecommunications capability."[210] Forbearance would advance the public interest because forcing carriers to provide unsupported service in areas where they are not otherwise incented to offer service impedes realization of that goal. Mandated uneconomic narrowband service provision undercuts providers' ability to invest in and deploy broadband facilities. As noted above, Chairman Wheeler recently stated that "the majority of the capital investments made by U.S. telephone companies from 2006 to 2011 went toward maintaining the declining telephone network, despite the fact that only one-third of U.S. households use it at all."[211] Those funds would have been more available for broadband deployment, and price cap carriers would have allocated more to such investments, if they had been free to do so.

The Commission has found that "regulation that constrains incentives to invest in and deploy the infrastructure needed to deliver broadband services is not in the public interest."[212] In Section 706, Congress specifically "direct[ed]" the Commission to "'utiliz[e]' its section 10

---

[210] *Id.* § 1302(a).

[211] Silicon Flatirons Address.

[212] *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18732 ¶ 49 (2007) ("*AT&T Forbearance Order*"), *aff'd sub nom. Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

'regulatory forbearance' power" to promote broadband investment.[213] Thus, consistent with Section 706, Section 10 should be applied to "promote [broadband] infrastructure investment" and eliminate "regulation that constrains incentives to invest in and deploy" such infrastructure – in this case, by forbearing from enforcement of costly Section 214(e) ETC designations and associated service obligations where a carrier receives no high-cost support.[214]

2. Forbearance Will Promote Competitive Neutrality.

In the *Transformation Order*, the Commission stated that its reforms "generally advance the principle of competitive neutrality" by ensuring that "providers that offer service without subsidy will no longer face competitors whose service in the same area is subsidized by federal universal service funding."[215] The Commission made no distinction in this regard between ILECs and competitive ETCs. The current application of Section 214(e)(1)(A), however, vitiates this promise of competitive neutrality by requiring price cap ETCs to provide unsubsidized service even where a subsidized competitor serves the same area. Indeed, the current regime requires the unsubsidized price cap ETC to compete against a subsidized provider in an area where the Commission has determined that it is uneconomic to provide service without support.[216]

---

[213] Brief for the Federal Communications Commission at 1, *Ad Hoc Telecommunications Users Committee, et al. v. FCC*, No. 07-1426 (D.C. Cir. filed Dec. 3, 2008) (citing 1996 Act, Pub. L No. 104-104, 110 Stat. 56, § 706(a), 47 U.S.C. § 157 note).

[214] *AT&T Forbearance Order*, 22 FCC Rcd at 18732 ¶ 49.

[215] *Transformation Order*, 26 FCC Rcd at 17731 ¶ 177.

[216] *Id.* at 17720 ¶ 145. *See also id.* at 17827 ¶ 502 (areas that "do not support a private business case for" provision of service).

In 2000, concerns over competitive neutrality nearly identical to those presented here led the Commission to opt against requiring new entrants to provide service throughout the service area as a prerequisite for designation as ETCs.[217] The Commission found that it was "unreasonable to expect an unsupported carrier to . . . provide a service that its competitor already provides at a substantially supported price."[218] "[A] requirement that a carrier . . . provid[e] service throughout the service area . . . is likely to have the effect of prohibiting the ability of carriers without eligibility for support to provide service in high-cost areas."[219] The Commission held that such a disadvantage violated the competitive neutrality requirement.[220] As in that case, requiring that any "unsupported carrier" – ILEC or CETC – "provid[e] . . . throughout the service area," including "high-cost areas," "a service that its competitor . . . provides at a substantially supported price" violates competitive neutrality.[221]

As the Fifth Circuit held in *Alenco*, the universal service program is required "by statute" to "treat all market participants equally . . . so that the market, and not . . . regulators, determines who shall compete for and deliver services to customers."[222] Regulators should not skew the market by forcing one carrier – the price cap carrier – to provide service in a high-cost area,

---

[217] *Federal-State Joint Board on Universal Service*, Declaratory Ruling, 15 FCC Rcd 15168 (2000).

[218] *Id.* at 15173 ¶ 13.

[219] *Id.* at 15174 ¶ 16.

[220] *Id.* at 15176-77 ¶ 21.

[221] *Id.* at 15173 ¶ 13, 15174 ¶ 16.

[222] *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 616 (5^{th} Cir. 2000) ("*Alenco*").